

**Board of Alien Labor Certification Appeals**

**UNITED STATES DEPARTMENT OF LABOR**

**Washington, D.C. 20001-8002**

**'Notice: This is an electronic bench opinion which has not been verified as official'**

DATE: March 12, 1997

CASE NO: 95-INA-296

IN THE MATTER OF:

**JADO SEWING MACHINE COMPANY**

Employer

on behalf of

**CARMEN BANICA**

Alien

Appearance: R. A. Klipstein, Esq., of New York, New York.

Before: Holmes, Neusner and Vittone  
Administrative Law Judges

**DECISION AND ORDER**

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer (CO) of an application for alien labor certification. The certification of aliens for permanent employment in the United States is governed by 212 of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A) and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.). Unless otherwise noted, all regulations cited in this decision refer to Title 20.

We base our decision on the record upon which the CO denied certification and the Employer's request for review as contained in the appeal file (AF) and any written arguments. 20 C.F.R. § 656.27(c).

**STATEMENT OF THE CASE.** The employer filed an Application for Alien Employment Certification (ETA 750A) on September 14, 1993 to permit it to employ the Alien permanently as a bookkeeper with the following duties:

Keep all corporate books, prepare invoices, pay bills, make payroll, close books periodically, pay sales tax, payable, receivable, keep general ledgers (sales, cost of goods) track of invoices, communicate in writing and by telephone

and FAX with suppliers and customers all over the world.<sup>1</sup>

The Employer identified the nature of its business as a manufacturer of industrial sewing machines and its address as 40-08 22nd Street, Long Island City, New York. It noted further in the ETA 750A that it required any applicant to have a high school degree and six months experience in the job offered. Special requirements were that the applicant must be fluent in both Rumanian and English, as the Employer wished to extend its sales and distribution of sewing machines and parts to customers in Romania. AF 07. The rate of pay was listed on the ETA 750A as \$375.00 per week.

In a Statement of Qualifications of Alien (ETA 750B), executed by the Alien under penalty of perjury on September 14, 1993, she reported that she had a high school diploma and a university degree in English from her native Romania and was fluent in both English and Rumanian. AF 05. In item 15 of the statement, which calls for a list of all the jobs held by the Alien during the past three years, she reported that she had been employed by the Employer as a bookkeeper since March 1990 and had been employed from May 1989 to February 1990 as a bookkeeper at Bianca Jewelers. She did not indicate in her description of her duties in each of these positions that they involved supervision of any other employees. AF 04.

On January 14, 1994, the New York State Department of Labor Alien Employment Certification Office (AECO) unit responsible for the initial processing of the application, advised Employer to clarify the educational requirements for the job and the job description. Employer was also required to confine the job to the duties of a single occupation, rather than combining the duties of bookkeeper and cashier. The Employer responded on February 9, 1994, by requiring the applicant to have eight years of grade school and four years of high school, deleted the job requirement of "keeping track of inventory" and stated that the job was for a bookkeeper only and that the duties of a cashier were not required. AF 16.

On February 28, 1994, the AECO advised Employer to clarify the job description again and informed the Employer that the prevailing wage for the position of bookkeeper was \$400.00 per week. The Employer responded, by counsel, on March 7, 1994, incorporating the required changes into Form ETA 750A and amending the Form to show \$400.00 per week as the wage it was offering. AF 21. The job description was amended to delete the reference to the nature of Employer's business activity.

The Employer proceeded to advertise the position for three days on or about April 1, 1994. The advertisement noted that the job site was in Long Island City, New York. On April 25, 1994

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<sup>1</sup>Text and punctuation is as in the original text.

the AECO referred to the Employer the six resumes it received as the result of the advertisement.

According to the Employer's May 3, 1994, Recruitment Report, the Employer contacted each of the six applicants by telephone for a personal interview. Among these applicants were Eleonora Capatina, Ikhil Kravets and Aurelian Moise. All applicants were rejected either for the inability to speak Rumanian or English, or for not having the requisite bookkeeping experience. AF 48-49.

In response to a questionnaire sent by the AECO, Applicant Capatina stated that she was contacted by Employer but that she was not asked for an interview, as Employer felt she did not have the requisite bookkeeping experience. Applicant Kravets stated that he was contacted by Employer, but was not asked for an interview despite possessing the work requirements, as Employer found his English to be poor. Applicant Moise was also contacted but also was not asked for an interview. AF 52-64.

The CO issued a Notice of Findings (NOF) on September 7, 1994 in which she proposed to deny certification because of the rejection of qualified U.S. Workers. Citing 20 CFR § 656.21(b), the CO said that, while the Employer successfully documented job-related reasons for rejecting four of the applicants, it appeared that two of the applicants were rejected for other than lawful, job-related reasons, as the Employer had not adequately explained why they were not qualified for the position. The CO stated with regard to Ms. Capatina that it appeared that the Employer disregarded her fourteen years of experience as an accountant, during which she performed the same duties described in the job description. The CO said as to Mr. Kravets that, while Employer rejected him because he could not speak English, this applicant said that he did speak English, contradicting Employer's documentation of recruitment results. The Employer was advised that he could rebut these findings by documenting specific lawful job-related reasons for rejection of each of the applicants.

On October 4, 1994, the Employer rebutted by submitting his written recollections of his telephone conversations with the applicants Capatina and Kravets. Employer stated that Capatina told him that her English was "no good" in a telephone interview. In addition, Employer concluded that Ms. Capatina's experience as an accountant was not similar to experience as a bookkeeper. Employer stated, however, that he would be willing to interview this applicant if requested. In addition, Employer stated that in contacting Mr. Kravets, he was unable to communicate with him in English, but that he would be given an interview in person, if requested. AF 73-74.

The CO denied certification in a Final Determination issued on October 12, 1994. The CO found that Employer successfully documented lawful job-related reasons for the non-hire of Mr.

Kravets. The CO found, however, that the Employer failed to rebut by further documenting specific lawful job-related reasons for rejection of Ms. Capatina. The CO noted that, while this U. S. worker fourteen years of experience in accounting and fluency in the English and Rumanian languages, the Employer reported that she did not speak English well and that her experience as an accountant was not experience as a bookkeeper. The CO concluded that the initial recruitment report filed by Employer did not mention Applicant's deficiency in English, but Employer later added the lack of English language fluency as a further reason for rejecting this applicant. The CO observed that in a routine follow-up this applicant communicated adequately in English and, as the Final Determination was not a request for Employer to interview Applicant, the application for Labor Certification should be denied. AF 78-79.

On October 20, 1994, the Employer filed a Request for Review with the CO, stating that in offering the job, he had intended to require at least six months of bookkeeping experience in the United States, rather than experience in a foreign nation such as Romania where the principles are much different from the United States. In support of this contention, the Employer supplied an affidavit from Arsaluis Nisanian, a bookkeeper from Romania, who is now living in the United States and who stated that a person with bookkeeping experience from Romania is not qualified to work as a bookkeeper in the United States. AF 82-84. Consequently, the Employer argued, Ms. Capatina was unqualified for this job because her experience as an accountant was acquired in Romania. Employer requested that the Board hold that the CO was in error in denying the labor certification, or in the alternative, that the Board allow him to re-advertise the job with the provision that six months of bookkeeping experience in the United States was the job requirement. The CO forwarded the case to the Board for review.<sup>2</sup>

### DISCUSSION

20 CFR §§ 656.21(b)(6) and 655.21(j)(I) provide that, if U.S. workers have applied for the job, the employer must document that they were rejected solely for law full job-related reasons. An employer must establish by convincing evidence that the U.S. applicant is not qualified for a job if he or she meets minimum requirements, as specified in the application. **United Parcel Service**, 90-IA-90 (Mar. 28, 1991); **Mancillas International Ltd.**, 88-IA-321 (Feb. 7, 1990); **Microbilt Corp.**, 87-IA-635 (Jan. 12, 1988). Because it failed to explain or to document its reasons for contending that the U. S. candidates lacked qualifications

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<sup>2</sup>The CO did not choose to treat the Employer's communication as a request for reconsideration, based on the offer to re-advertise.

for this position, the Employer did not sustain its burden of proving that those applicants were rejected for lawful job-related reasons. **Seaboard Farms of Athens, Inc.**, 90-IA-383 (Dec. 3, 1991).

It is well established that where an applicant's resume shows a broad range of experience, education and training that raises a reasonable possibility that the applicant is qualified the employer bears the burden of further investigating the credentials of the applicant. **Gorchev & Gorchev Graphic Design**, 89-IA-118 (Nov. 29, 1990)(en banc). In cases where the resume shows that an applicant meets major job requirements but is unclear on whether the applicant meets all job requirements, this holding has been applied to require that the employer interview the applicant or otherwise investigate further to determine whether the applicant is, in fact, qualified. Ms. Capatina's resume suggests that she may be qualified for the position the Employer offered in its application.

The issue in this case is whether Employer provided lawful job-related reasons for rejecting the U.S. workers, Mr. Kravets and Ms. Capatina. The Employer contends that its President interviewed Ms. Capatina by telephone and concluded that she was not qualified for the job. Although Ms. Capatina spoke Rumanian, she possessed only one month of part-time bookkeeping experience, which was less than the required six months of experience in the position offered. Employer contends that while Ms. Capatina is experienced as an accountant, this is not equal to experience as a bookkeeper. Additionally, Employer contends, the Applicant's accounting experience in Romania does not qualify her for a bookkeeping position in the U.S. The issue is whether Ms. Capatina, by formal education, training and experience, or a combination of these factors is able to perform the duties of the job in the normal, accepted manner. 20 CFR § 656.24(b)(2)(ii).

(1) The Employer's application required that the applicant be fluent in English and Rumanian, and Employer said that Ms. Capatina told him that her English was "no good", an allegation with which Ms. Capatina strongly disagreed. As Employer did not state that Ms. Capatina was unable to communicate in English in his initial Recruitment Report, we find Employer's contentions are not credible. Accordingly, we conclude that Ms. Capatina possesses the ability to communicate in English. **NTU Circuits, Inc.**, supra.

(2) In addition, the labor certification application states that the applicant must have six months experience and lists various tasks to be performed in the job. The requirements of the bookkeeper position as listed by Employer---keep corporate books, prepare invoices, pay bills, prepare accounts payable and receivable, keep ledgers---are substantially similar in nature to

the tasks performed by Ms. Capatina for twelve years as an accountant in her position in Romania and for a limited time as a part-time bookkeeper in New York.<sup>3</sup> It follows that Ms. Capatina possesses sufficient experience and meets the other requirements necessary to perform successfully in the job offered. **Millcraft Manufacturing Corp.**, 94-IA-60 (Apr. 28, 1995). Although the Employer additionally required that the six months of bookkeeping experience be in the United States because, Employer claimed, the bookkeeping systems in the United States and Romania differ to the extent that Ms. Capatina could not perform the duties of the position offered, these circumstances were not presented until after the CO issued the Final Determination. These contentions will not be addressed here, as they are outside the scope of the record on review. **Francisco Potestas**, 94-IA-204 (Apr. 26, 1995).

We conclude that the CO properly found that Employer failed to show lawful job-related reasons for rejecting Mr. Kravets and Ms. Capatina. Accordingly, the following order will enter.

#### ORDER

The Certifying Officer's DENIAL of labor certification is hereby AFFIRMED.

For the panel

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FREDERICK D. NEUSNER  
Administrative Law Judge

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2 Ms. Capatina's resume and her response to questioning from AECO states that in her position as an Accountant in Romania, she was responsible for preparing financial statements, preparing accounts receivable and accounts payable, preparing payroll and Bank reconciliation and filing customer records. In her position as a part-time bookkeeper in New York, Ms. Capatina's resume lists her duties as preparing invoices and filing customer invoices, preparing payroll, bank reconciliation, accounts payable and receivable and keeping all books and posting in general ledger. AF 61-64.

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

## BALCA VOTE SHEET

Case Name: **JADO SEWING MACHINE COMPANY**, Employer  
**CARMEN BANICA**, Alien

Case No. : 95-INA-296

PLEASE INITIAL THE APPROPRIATE BOX.

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	:	CONCUR	:	DISSENT	:	COMMENT	:
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Holmes	:	:	:	:	:	:	:
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Vittone	:	:	:	:	:	:	:
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Thank you,

Judge Neusner

Date: March 5, 1997